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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GEORGE C. ROGERS,

Petitioner,

versus

LOCKHEED-GEORGIA COMPANY and
AERONAUTICAL MACHINISTS LODGE 709,
THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Petitioner

Dated: May 29, 1984

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QUESTIONS PRESENTED FOR REVIEW

I.

Is it proper for a federal court to give retroactive application to a newly prescribed statute of limitations, or any other newly formulated rule of law whether it be legislative, judicial, or administrative which constitutes a clear break from past precedent and which serves to extinguish a Plaintiff's cause of action in a pending private civil suit, without considering the inequitable results to the individual parties to the litigation in light of the holding in Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971).

II.

Is it proper for a federal court to rule that the six month statute of

limitations, applied for the first time by the Supreme Court to hybrid breach of collective bargaining agreement/unfair representation actions in Del Costello v. International Brotherhood of Teamsters, et al, _____ U.S. _____, 103 S.Ct. 2881 (June, 1983), is to be applied retroactively on the basis of a national policy of uniformity alone, totally ignoring the inequities that would result to the individual Plaintiffs.

III.

Does the holding in Chevron Oil, supra demand a non-retroactive application of the statute of limitations newly formulated in Del Costello, supra in the instant case, in light of Del Costello's dual purpose of protecting

both federal interests and the interests of individual employees, and the facts of this case which show that the Petitioner's cause of action arose over four years before the Del Costello decision was rendered, his complaint was filed more than three years before that time, and his case was fully prepared and a trial completed two years prior to that decision.

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.

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THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, GEORGE C. ROGERS (hereinafter referred to as "Rogers"), respectfully prays that a Writ of Certiorari

issue to review the decision of the United States Court of Appeals for the Eleventh Circuit rendered in this case.

OPINIONS BELOW

The Petitioner requests the Supreme Court to review the opinion of the United States Court of Appeals for the Eleventh Circuit rendered in his case. This opinion is reported at 720 F.2d 1247 (1983) and a copy is attached hereto in Appendix 1 (A-1).

The opinion and judgment of the Eleventh Circuit reversed the Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division. The Findings of Fact and Conclusions of Law upon

which the trial court's judgment was based are attached hereto as Appendix 2 (A-2).

A copy of the judgment of the Eleventh Circuit reversing the District Court's opinion, the amendment to that judgment and the order entered denying Rogers' Petition for Rehearing are attached hereto in Appendixes 3 (A-3), 4 (A-4) and 5 (A-5) respectively.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on December 5, 1983. Rogers filed a timely Petition for Rehearing which was denied on March 1, 1984. This Petition for Writ of Certiorari was

filed within 90 days of March 1, 1984, as is required by 28 U.S.C. §2101(c) and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED

The questions presented above do not directly involve the interpretation of a statute, but involve the retroactive application of a newly prescribed statute of limitations by the federal courts. The following statute contains the statute of limitations which was retroactively applied to the instant case by the Eleventh Circuit.

National Labor Relation Act §10(b), 29 U.S.C. §160(b)

Wherever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than 5 days after the serving of said complaint: Provided, that no

complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made, unless the person agrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event the six month period shall be computed from the date of his discharge...

STATEMENT OF THE CASE

I. THE RELEVANT FACTS.

Rogers was first employed by Lockheed Georgia Company (hereinafter

referred to as "Lockheed") on July 12, 1965. With the exception of two periods of layoff between 1972 and 1975, he worked continuously at Lockheed's Marietta Georgia plant until he was laidoff on January 21, 1977. At all times since July 12, 1965, Rogers has been a member of the Aeronautical Machinists Lodge 709, The International Association of Machinists and Aerospace Workers (hereinafter referred to as the "Union"). The Union has been the sole bargaining representative for Lockheed's hourly employees in Rogers' position during the period of his employment with Lockheed. (T 22-25).

At the time of Rogers' layoff in January of 1977, his seniority date was July 12, 1965. (T 22) Each hourly

employee at Lockheed has a seniority date established by his first date of employment with Lockheed. An employee's seniority date determines, among other things, the order in which employees are laid off and recalled, the amount of vacation time which they received, their priority for promotions and new job assignments, and their retirement rights. Therefore, it is extremely important to the employees' job security. (T 45, 147) On June 29, 1978, Lockheed stripped Rogers of his 1965 seniority date and thus his seventeen years of seniority. (T 223, 224)

Rogers maintained that he was deprived of his seniority in breach of the collective bargaining agreement in effect between Lockheed and the Union

and turned to the Union for assistance. He filed a grievance, but in April of 1979, the grievance was returned to him by the Union unprocessed. (T 48, 49, 212; Exhibit "P-10") Rogers tried to talk with the Union president about processing his grievance after the same was returned to him, but to no avail. (T 50)

II. THE PROCEEDINGS BELOW.

On March 18, 1980, Rogers filed a Complaint against Lockheed for breach of its collective bargaining agreement and against the Union for unfair representation, which lawsuit initiated the instant judicial proceedings. (R 4-9) The United States District Court for the Northern District of Georgia, Atlanta Division had jurisdiction over

this matter pursuant to 29 U.S.C. §185.

Motions for Summary Judgment were filed by all parties. However, none were granted, and the Honorable Charles A. Moye, Jr., sitting without a jury, heard the evidence presented in the case during the week of June 26, 1981. The trial court entered a judgment on September 30, 1981 in favor of Rogers and against Lockheed for restoration of seventeen years of Rogers' seniority, together with certain wages he had lost and benefits which had been forfeited; and in favor of Rogers and against the Union for $13,261.80 in attorney's fees. (R 636)

On October 6, 1981, both Defendants filed Motions for a New Trial or Reconsideration, arguing in part that

Rogers' action should be barred by the six month statute of limitations applied to administrative actions under §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). (R 636, 640) These motions were denied on December 23, 1981, and both Lockheed and the Union filed timely Notices of Appeal for appeal to the Eleventh Circuit Court of Appeals. (R 669, 672, 673) The Eleventh Circuit had jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291. All briefs of the parties in this action, including the Appellant's reply briefs were filed with the Eleventh Circuit by July of 1982.

When Rogers' cause of action arose in the spring of 1979 and when he filed his Complaint in March of 1980, the

Fifth Circuit, which included Georgia prior to the formation of the Eleventh Circuit, had held that since there was no federal statute of limitations for hybrid breach of collective bargaining agreement/unfair representation actions such as the instant one, a state statute of limitations would be borrowed and that a state tort statute of limitations for personal injury actions would be appropriate. Sanderson v. Ford Motor Company, et al, 483 F.2d 102, 114 (5th Cir. 1963) Georgia's statute of limitations for personal injury actions is two years. Ga. Code Ann. §3-1004, O.C.G.A. §9-3-31

It was not until June of 1983, when Rogers' cause of action was four years old and after his case had been

tried and had been pending before the Eleventh Circuit for eighteen months that this Court borrowed the six month statute of limitations from 29 U.S.C. §160(b) to apply to cases such as this. Del Costello v. International Brotherhood of Teamsters, et al, ____ U.S. _____ 103 S.Ct. 2881 (June,1983) On December 5, 1983, the Eleventh Circuit ruled in this case and five other similar cases, that the six month statute of limitations prescribed in Del Costello would be applied retroactively to hybrid breach of collective bargaining agreement/unfair representation cases because of federal interests in uniformity with no view to the facts of a particular case or the rights of any individual Plaintiff. This is the decision that Rogers is asking this Court to review.

REASONS FOR GRANTING THE WRIT

As is more particularly discussed below, this Petition for a Writ of Certiorari should be granted because the Eleventh Circuit Court of Appeals has rendered an opinion in the Petitioners case that is in direct conflict with previous rulings of this Court, a split is occurring among the circuit courts of appeal on the issue involved in this case, and the issue involved is an important question of federal law whose resolution will have a direct impact on the rights of other litigants in the federal courts.

I. IN RETROACTIVELY APPLYING THE SIX MONTH STATUTE OF LIMITATIONS TO THIS CASE HELD APPLICABLE TO HYBRID BREACH OF COLLECTIVE BARGAINING AGREEMENT/UNFAIR REPRESENTATION CASES FOR THE FIRST TIME BY THIS COURT IN DEL COSTELLO V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, _____ U.S. _____, 103 S.Ct. 2281 (June 1983), WITHOUT CONSIDERING THE INEQUITIES THAT SUCH RETROACTIVE APPLICATION WOULD CAUSE TO THE PLAINTIFF, THE ELEVENTH CIRCUIT DECIDED THIS CASE IN A MANNER WHICH CONFLICTS WITH THE HOLDING IN CHEVRON OIL COMPANY V. HUSON, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-56 (1971).

In December of 1983, the Eleventh Circuit retroactively applied

the statute of limitations prescribed for the first time in Del Costello to the Rogers case, along with five other similar cases pending before it. In this case, the Eleventh Circuit properly held that Chevron Oil provided the proper analysis for determining whether a newly annunciated statute of limitations should be applied retroactively or prospectively only. [1]

The general rule of law is that an appellate court must apply the law in effect at the time it renders its decision. Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281, 89 S.Ct. 518, 525 (1969). However, in a private civil suit where the change acts to extinquish the Plaintiff's cause

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[1] In the Del Costello opinion, this Court did not rule on the retroactive application issue.

of action, an exception has been drawn to the general rule to prevent "manifest injustice". Bradley v. Richmond School Board, 416 U.S. 696, 717, 94 S.Ct. 2006, 2019 (1974); See Gulf Offshore Company v. Mobile Oil Corporation, 453 U.S. 473,486 fn. 16, 101 S.Ct. 2870, 2879 fn. 16 (1981).

This Court in Chevron Oil defined a three part test to determine when "manifest injustice" would occur. That test calls for the consideration and balancing of three elements:

a) Whether a new principal of law has been established [2]; and

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[2] The Eleventh Circuit premised its decision in the Rogers case on the fact that Del Costello overruled past precedent and therefore that this first threshold element had been met.

b) Whether retroactive operation will further or retard the new rule's operation in light of the history of the rule, and its purpose and effect; and

c) Whether retroactive application "could produce substantial inequitable results" in individual cases. Chevron Oil, supra at 404 U.S. 106, 107, 92 S.Ct. 355.

In the Rogers decision, the Eleventh Circuit addressed the third element of the above-listed test only by stating that prospective application of Del Costello would cause inequitable results to the federal interests by applying numerous state statutes of limitations to essentially similar federal causes of action. No mention was made or attention given to the inequities that retroactive application of the new statute of limitations would cause to

Rogers or the other parties whose cases were decided in that opinion. This is in direct conflict with the Chevron Oil decision and the subsequent decisions of this Court which state the inequities to the individual parties in such a case are important and must be weighed. See Northern Pipeline Construction Co. v. Marathon Pipeline Co., _____ U.S. _____, 102 S.Ct. 2858, 2880 (June, 1982); United States v. Johnson, _____ U.S. _____, 102 S.Ct. 2579, 2587 (June, 1982); Lemon v. Kurtzman, 411 U.S. 192, 204-208, 93 S.Ct. 1463, 1471, 1472 (1973).

This Court, in analyzing the third element of the above-listed test, as it applied to the facts of Chevron Oil, noted in that case that the Plaintiff's injury occurred more than three years before the determination of the new

statute of limitations by the Supreme Court. The Plaintiff instituted his lawsuit more than one year before the statute of limitations was announced by the Court, and if the new statute of limitations was applied to the Plaintiff's case, his action would have been time-barred more than two years before the newly applied statute of limitations came into effect. This Court concluded, in light of those facts, "we should not indulge in the fiction that the law now announced has always been the law, and therefore, that those who did not avail themselves of it waived their rights...Both a devotion to the underlying purpose of the (statute of question) ...and a weighing of the equities requires nonretroactive application of the statute

of limitations here." Chevron Oil, supra at 404 U.S. 107, 92 S.Ct. 356

In the case here before the Court for consideration, Rogers' cause of action occurred more than four years prior to the Del Costello ruling, and he initiated his lawsuit more than three years before this ruling. If Del Costello is applied retroactively to the Rogers case, then Rogers' cause of action was barred by the statute of limitations established in Del Costello over three and one-half years before that statute was applied to a case such as this. Time factors less dramatic than those in Rogers "required" prospective application in Chevron Oil, but the Eleventh Circuit did not even consider the time factors in Rogers' case. Thus, not

only has the Eleventh Circuit eliminated, through the Rogers decision, an important element of the Chevron Oil test, it has set a very disturbing precedent disregarding the individual interests of the parties to a judicial proceeding.

The gravity of the Eleventh Circuit's omission, in failing to consider the inequities that retroactive application of the statute of limitations would cause Rogers, becomes even more apparent in light of the purpose and history of the Del Costello rule that Chevron Oil indicates should be examined as part of the second element of the test. This court in Del Costello specifically states that dual interests were considered in its adoption of the six month statute of limitations, those being the "national interest" in uniformity and the "employees interest in setting aside what he views

is an unjust settlement under the collective bargaining system". Thus, the purpose of the six month statute of limitations is not just to serve federal interests, but to serve individual interests as well. The Eleventh Circuit totally ignored those individual interests in the instant case.

As to the history of the statute of limitations as applied to hybrid breach of collective bargaining agreement/ unfair representation cases, until Del Costello, state statutes of limitations had generally been applied. See International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966). For years, the federal judicial system dealt with this cause of action without a uniform statute of limitations. Although

Del Costello does hold that it is in the best interest of national policy that a uniform statute be adopted, this interest has not been so compelling that either Congress or this Court felt obligated to pronounce such a uniform statute until June of 1983. Thus, balancing the interests involved, as Chevron Oil directs, but as the Eleventh Circuit failed to do in Rogers, it becomes obvious that little harm would come to the federal interests in question by failing to apply Del Costello retroactively in this particular case, but by retroactive application of the Del Costello ruling, Rogers is deprived of 17 years of his job seniority for which he worked and which the finder of fact ruled had been unjustly taken from him.

Chevron Oil states that in deciding whether to apply a newly annunciated statute of limitations to a civil action, three factors must be considered. The Eleventh Circuit in the Rogers case failed to consider the interests of the individual parties involved, which is an integral part of the third element of the Chevron Oil test. By so doing, the Eleventh Circuit comes into direct conflict with Chevron Oil. The particular facts of the Rogers case vividly demonstrate the necessity of analyzing all three elements listed in Chevron Oil when applying a newly defined statute of limitations, and the inappropriate results which can occur when one of the elements is omitted from the analysis. Therefore, this would be an appropriate case for this Court to review to reaffirm

its holding in Chevron Oil before the Eleventh Circuit and other courts stray further from its holdings.

II. THERE IS A SPLIT BETWEEN THE CIRCUIT COURTS OF APPEAL ON THE MANNER IN WHICH THE CHEVRON OIL TEST SHOULD BE APPLIED WHICH IS ILLUSTRATED BY THEIR APPLICATION OF THE SIX MONTH STATUTE OF LIMITATIONS PRESCRIBED FOR BREACH OF COLLECTIVE BARGAINING AGREEMENT/UNFAIR REPRESENTATION CASES IN DEL COSTELLO.

All circuits that have directly addressed the issue of whether Del Costello should be retroactively or prospectively applied in any given case have agreed that Chevron Oil provides the analysis to be

used in making that decision. Further, all the circuits but the Eleventh Circuit in the Rogers decision, with its five companion cases, have, at least in some fashion, addressed the inequities that would result to the Plaintiff if the six month limitation period was applied retroactively. Scott v. Local 863, 725 F.2d 226 (3rd Cir. 1984); Perez v. Dana Corporation, 718 F.2d 581 (3rd Cir. 1983); Murray v. Branch Motor Express Company, 723 F.2d 1146 (4th Cir. 1983); Edwards v. Sea Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Pitts v. Frito-Lay, Inc., 700 F.2d 330 (6th Cir. 1983); Barina v. Gulf Trading and Transport Company,

726 F.2d 506 (9th Cir. 1984); McNaughton v. Dillingham Corporation, 722 F.2d 1459 (9th Cir. 1984) [3]; Edwards v. Teamsters Local 36, et al, 719 F.2d 1036 (9th Cir. 1983); Rogers v. Lockheed, 720 F.2d 1247 (11th Cir. 1983). The Eleventh Circuit stands alone in that it is the only appellate court which refused in any manner to address the individual facts of the case.

However, in applying the three elements of the Chevron Oil test,

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[3] In McNaughton, supra, the Ninth Circuit ruled, under the Chevron Oil test that Del Costello would not be applied retroactively in that case because of the inequities that it would cause the individual plaintiff, cutting off his remedy in total. A Petition for Writ of Certiorari was filed with the Supreme Court in that case on April 26, 1984 in Supreme Court case number 83-1739.

the Ninth and Sixth Circuits, which applied the six month statute of limitations prospectively only gave weight to the individuals rights and the dual purpose of the Del Costello limitations period which included the protection of the individual employee, while the Third, Fourth and Fifth Circuits, admittingly lead by the Perez decision of the Third Circuit, only gave lip service to the third element of the test.

This split is illustrated by contrasting the Ninth Circuit's statement in Edwards, supra that "retroactive application of a shorter statute is inherently unfair," with the Third Circuit's

statement in Scott, supra that "the primary consideration...is whether retrospective application will promote or retard the policies that gave rise to the change in the decisional law".

This disparity in the treatment of the Chevron Oil test should be resolved. It appears that the Third, Fourth, Fifth and Eleventh Circuits are taking the position that the individual litigant and his rights have very little import in relation to federal interests of uniformity and judicial economy. The Eleventh Circuit's opinion in the case here before this Court is the most pronounced in this respect. This trend is anomalous to this Court's holdings on

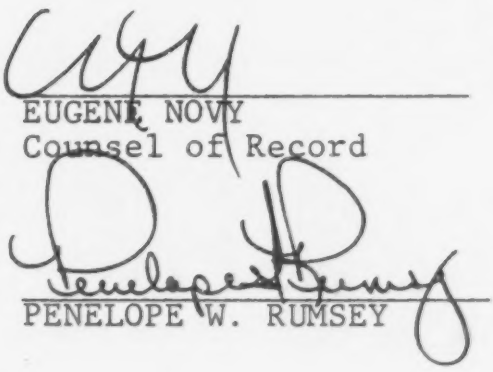
retroactive application of a new rule of law in Chevron Oil, Northern Pipeline Construction Company, supra, U.S. v. Johnson, supra and Lemon, supra. These cases all value the rights of the individual litigants and recognize the importance of being able to rely on the law as it stands.

III. CONCLUSION.

On the basis of the foregoing, a Writ of Certiorari should issue to review the judgment and opinion

of the Eleventh Circuit, and upon review, this Court is requested to reverse that decision.

Respectfully Submitted,



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CERTIFICATE OF TIMELY FILING

Personally appeared before the undersigned officer duly authorized to administer oaths, Eugene Novy, who states that he has personal knowledge of the following facts and that they are true and correct:

On May 29, 1984, forty (40) copies of the foregoing Petiton for a Writ of Certiorari were filed with the Clerk of the Supreme Court of the United States pursuant to Rule 28.2 of the Supreme Court Rules by depositing the same in a United States Post Office with First Class postage prepaid, and properly addressed to the Clerk of the Supreme Court. This filing was made

within the ninety (90) day jurisdictional period required for the filing of Petitions for a Writ of Certiorari after the ruling of the Circuit Court denying Petitioner's Motion for Rehearing. I am a member of the bar of the Supreme Court of the United States.

EUGENE NOVY

Sworn to and subscribed
before me this 29th day
of May, 1984.

NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires July 25, 1987

CERTIFICATE OF SERVICE

The undersigned member of the Bar of Supreme Court of the United States, Eugene Novy, on behalf of the Petitioner, George C. Rogers, hereby certifies that he has served the opposing parties in this action this date by mailing each of their counsel three (3) copies of the foregoing Petition for a Writ of Certiorari pursuant to Rule 28.3 of the Supreme Court Rules by depositing the same in a United States Post Office with First Class postage prepaid and addressed as follows:

Thomas H. Christopher, Esq.
Kilpatrick & Cody
3100 Equitable Bldg.
Atlanta, GA 30303

J. R. Goldthwaite, Jr., Esq.
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777 West Peachtree St., N.E.
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This the 29th day of May, 1984.

EUGENE NOVY

APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7810
Non-Argument Calendar

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*GEORGE C. ROGERS,

Plaintiff-Appellee,

versus

LOCKHEED-GEORGIA COMPANY and the Aeronautical Machinists Local Lodge 708, the International Association of Machinists and Aerospace Workers,

Defendants-Appellants,

OTIS BATES,

Plaintiff-Appellant,

versus

AMERICAN TARA CORPORATION, et al,

Defendants-Appellees.

RAYMOND L. SANDERS,

Plaintiff-Appellant,

versus

THE GRAND UNION COMPANY and United Food and Commercial Workers International Union, Local 441,

Defendants-Appellees,

RONALD ARTHUR LAKE,

Plaintiff-Appellant,

v.

MARTIN MARIETTA CORPORATION, a foreign corporation; Local 788, United Automobile, Aerospace and Agricultural Implement Workers of America; and International Union, United Automobile Aerospace and Agricultural Implement Workers of America,

Defendants-Appellees.

BERNARD GRAHAM,

Plaintiff-Appellee,

versus

INTERNATIONAL CHEMICAL WORKERS UNION, LOCAL 784,

Defendant-Appellant.

DERRICK HANSON,

Plaintiff-Appellant,

versus

MOTOR CONVOY, INC., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 390, an unincorporated local organization,

Defendants-Appellees.

Appeals from the United States District Court
For the Northern District of Georgia

Appeals from the United States District Court
For the Middle District of Florida

Appeals from the United States District Court
For the Southern District of Florida

(December 5, 1983)

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

* Case which is subject of this Petition.

GODBOLD, Chief Judge:

These six consolidated cases were stayed pending this court's en banc consideration of Hand v. International Chemical Workers Union, No. 81-5828. Hand and the present cases involve the applicable statute of limitations for an action that combines a breach of contract claim against an employer with a breach of duty of fair representation claim against a labor union. After this court granted en banc consideration to Hand 681 F2d 1308, the Supreme Court granted certiorari in two cases presenting the same issue, see Del Costello v. International Brotherhood of Teamsters and United Steelworkers of America v. Flowers, ____ U.S. _____, 103 S.Ct. 442, 74 L.Ed.2d 599 (1982), and en banc consideration was withheld pending decision in Del Costello. The Court

decided Del Costello June 8, 1983, see _____ U.S. _____, 103 S.Ct. 2281, 76 L.Ed2d 476 (1983), and the en banc court then remanded Hand to the panel for consideration in light of Del Costello. See 712 F.2d 456 (11th Cir. 1983). On August 8, 1983, the panel issued its decision in Hand. See 712 F.2d 1350 (11th Cir. 1983).

In Del Costello the Supreme Court held that the six-month statute of limitations under section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) (1976), governed a hybrid breach of contract/duty of fair representation claim. Each of the hybrid actions in these six cases was filed outside the six month limitations period. The only remaining issue is whether the six month period of Del Costello will be applied retroactively

to these cases. We have considered supplemental briefs from the parties on this issue. We hold that Del Costello does apply.

I. Retroactivity

It is a "general rule of long standing...that judicial precedents normally have retroactive as well as prospective effect." National Association v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976). The Supreme Court in Del Costello applied its decision retroactively to the parties before the Court. Plaintiff Flowers, in the companion case to Del Costello, filed suit in 1979 on a cause of action that had accrued 10 months earlier. The court of appeals found his action timely under a state three year statute. The Supreme Court held, however, that §10(b)'s six month statute of limitations applied and that Flowers's action was, therefore, barred. Thus

the Court retroactively applied its decision to a cause of action accruing several years earlier.

The test for nonretroactive application of a decision found in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), further supports our conclusion. In Chevron the Supreme Court held that retroactive application is inappropriate only where (1) the new rule overrules clear past precedent or decides an issue of first impression whose resolution was not foreshadowed; (2) retroactive application will retard rather than further operation of the rule; and (3) retroactive application will produce substantial inequitable results. Id. at 106-07, 92 S.Ct. at 355-56.

Assuming without deciding that Del Costello overruled past precedent, we believe that denying retroactive

application would retard rather than further the operation of the rule. In Del Costello the Court indicated the necessity of selecting a limitations period long enough to permit employees to vindicate their rights yet short enough not to prevent "the relatively rapid final resolution of labor disputes favored by federal law." _____ U.S. _____ , 103 S.Ct. at 2292, 76 L.Ed2d at 491. Section 10(b) embodied such a balance:

> In §10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case.

The employee's interest in setting aside the "final and binding" determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates "those consensual processes that federal labor law is chiefly designed to promote-the formation of the...agreement and the private settlement of disputes under it." [Auto Workers v.] Hossier [Corp.], 383 U.S. [696] at 702 [86 S.Ct. 1107 at 1111, 16 L.Ed.2d 192 (1966)]. Accordlingly, "[t]he need for uniformity" among procedures followed for similar claims, ibid., as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of §10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." [United Parcel Service, Inc. v. Mitchell] 451 U.S. [56] at 70-71 [101 S.Ct. 1559

at 1567-68, 67 L.Ed.2d 732]. Id. _____ U.S. at _____, 103 S.Ct. at 2294, 76 L.Ed.2d at 493 (quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 70-71, 101 S.Ct. 1559, 1567-68, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring)).

Plaintiffs urge the application of inconsistent state statutes of limitations with periods much longer than the six-months adopted in Del Costello. To apply those state statutes and deny retroactive application to Del Costello would retard rather than further the federal interests in prompt resolution of labor disputes finality, and consistency embodied in Del Costello.

Prospective application of Del Costello would cause inequitable results. Numerous state statutes of limitations would apply to essentially similar

federal causes of action. Prospective application would extend the inconsistent results that Del Costello sought to remedy.

We hold that Del Costello applies to these cases. Our conclusion is buttressed by two recent decisions of this court. Both the panel decision in Hand after remand from the en banc court, see 712 F.2d 1350 (11th Cir. 1983), and Benson v. General Motors Corp., 716 F.2d 862 (11th Cir. 1983), applied Del Costello retroactively, although neither case specifically discussed the retroactivity issue. See also Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir. 1983) (applying Del Costello retroactively with no discussion of retroactivity).

II. Disposition of these cases

A. No. 81-7810

Grievance filed March 1979 and returned unprocessed by employer approximately one month later. Union failed to indicate any determination by it on the grievance, which the district court found was a breach of duty of fair representation. Plaintiff sued March 1980, approximately 11 months after union breach. There is no merit to plaintiff's argument that a remand is necessary to establish when the right of action accrued. District court denied defendants' motion for summary judgment raising timeliness. Judgment for plaintiff REVERSED.

B. No. 82-3005

Union completed processing of the grievance and decided not to present it to an arbitrator in September 1980.

Plaintiff sued August 1981. Action held time barred under Florida statute, 541 F.Supp. 621. Since six months had expired, AFFIRMED.

C. No. 82-5625

Grievance denied October 1979; suit filed May 1981. Summary judgment for defendants, 538 F.Supp. 725, AFFIRMED.

D. No. 82-5115

Grievance filed June 1980, union withdrew it, and plaintiff learned of withdrawal October 1980. Suite filed May 1981. Defendants' motion to dismiss denied and interlocutory appeal granted under 28 U.S.C. §1292(b). Order denying dismissal is REVERSED.

E. Nos. 82-5194, 82-5313, and 82-5589

Grievance denied May 1979, suit filed June 1980. Judgment for defendants AFFIRMED.

F. No. 82-8137

Dispute submitted to arbitration. Arbiter's award in favor of employer in May 1980. Suit filed April 1981. Count I asserted a hybrid breach of contract/breach of duty claim. Summary judgment granted for defendants on this count, and defendant union and defendants Slad, Meers, and Turner dismissed from Count II. Final judgment granted as to union, Meers, and Turner. Summary judgment for defendants AFFIRMED.

APPENDIX A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE C. ROGERS,	)	
	)	
v.	)	
	)	
THE LOCKHEED GEORGIA COMPANY AND THE AERONAUTICAL MACHINISTS LOCAL LODGE 709, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	)	CIVIL ACTION
	)	
	)	FILE NO.
	)	
	)	C80-461A

ORDER OF COURT

This action was tried to the Court, sitting without a jury on June 26 and 29, 1981. On June 30, 1981, all parties rested, and the Court directed the filing of post-trial briefs. On the basis of the testimony heard at trial and the post-trial briefs submitted

by counsel subsequent thereto, the Court enters the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

Findings of Fact

1. Plaintiff, George C. Rogers, was first employed by defendant The Lockheed-Georgia Company (hereinafter referred to as "Lockheed") on July 12, 1965. Except for two layoff periods between 1972 and 1975, he worked continuously at Lockheed's Marietta, Georgia plant until he was laid off on January 21, 1977.

2. At all times since July 12, 1965, plaintiff has been a member of defendant Aeronautical Machinists Local Lodge 709, The International Association of Machinists and Aerospace Workers (hereinafter referred to as "the Union"), and since that date there has been a

collective bargain agreement in force between Lockheed and the Union.

3. In January of 1977, plaintiff was laid off by Lockheed. Several weeks after this layoff, plaintiff learned of and applied for an opening in Iran with Lockheed Aircraft Service Company (hereinafter referred to as "LAS"). LAS and defendant Lockheed are divisions of the Lockheed Corporation. Plaintiff first interviewed with LAS in an office located in the same building as Lockheed's employment office. Plaintiff was offered and accepted a two-year job as a material analyst with LAS in Iran.

4. On accepting this job, plaintiff notified Lockheed's employment office in person that he had accepted employment with LAS and that he would be moving to LAS's plant in Tehran, Iran. No one in Lockheed's employment

office requested that plaintiff fill out or sign a "change of address form."

5. Plaintiff left for Iran in April 1977, accompanied by his wife. Plaintiff's wife also worked for Lockheed, but took a leave of absence to be with her husband.

6. On June 20, 1978, Lockheed's employment recruiting coordinator, Mr. W. M. McDonald, mailed the plaintiff a recall notice addressed to his home in Marietta, Georgia, but did not send a copy to plaintiff at LAS in Iran. Because plaintiff failed to respond to the June 20, 1978 notice of recall within one week, Mr. McDonald addressed another letter to the plaintiff in Marietta on June 29, 1978, informing him that by failing to respond to Lockheed's earlier letter plaintiff had forfeited his seniority and his

recall rights under Part B, Article IV, Section 8(3) of the collective bargaining agreement between Lockheed and the Union.

7. Article IV, Section 8 of the collective bargaining agreement covering plaintiff provides:

> An employee shall lose his seniority upon the happening of any one of the following events:...
>
> (3) If, after a layoff, the employee is notified to report for an interview for work, by certified mail, or telegram, addressed to him at his address on record at time of layoff (or to the last subsequent address delivered by certified mail, telegram, or in person to the Employment Office of the plant), and fails within one (1) week after notification or such additional time as the Company may grant either to report for an interview or to deliver to the Company a reasonable excuse for failure to report.

8. There is no requirement in the collective bargaining agreement that an employee notify Lockheed of a change of address through a specific change of address form.

9. Plaintiff first learned of Lockheed's attempt to recall him when he returned to the United States for a three-week vacation on July 3, 1978. On the first day that Lockheed's employment office opened after July 4, that being July 5, 1978, plaintiff went in person to inquire about the situation. Plaintiff was told by Lockheed that he had not responded to the recall notice in a timely fashion.

During the next three weeks while plaintiff was in this country, he contacted the Union several times in an attempt to talk with one of the officers of the local. On the last day before plaintiff was scheduled to

return to Iran, he received a call from Leonard Moody, vice president of the Union, who advised plaintiff that Lockheed had not breached the collective bargaining agreement and that nothing could be done about the situation. Thereafter, plaintiff returned to his job in Iran.

10. In February of 1979, plaintiff left Iran due to the political turmoil there. He returned directly to Marietta and, because his house was leased, stayed with his brother-in-law. In Marietta, plaintiff telephoned Mr. McDonald at Lockheed's employment office. Mr. McDonald explained that Lockheed would be willing to offer him a new job, in which he would retain his credit for all company service but would not recoup his previously-forfeited seniority. Plaintiff was placed back on Lockheed's payroll on March 9, 1979.

11. Plaintiff returned to work for Lockheed on March 9, 1979. On returning to work, he explained the situation under which he lost his seniority to his Union steward who advised him to file a grievance. On March 16, 1979, a grievance was filed on behalf of the plaintiff stating that plaintiff had been wrongfully deprived of his seniority under the collective bargaining agreement. Plaintiff received no response for approximately one month, at which time the grievance package was returned to him unprocessed with the statement by the employer "your complaint is rejected and will not be processed in the grievance procedure." The Union failed to indicate any determination by it on plaintiff's grievance.

12. Article III, Section 1 of the collective bargaining agreement provides, inter alia:

> (B) The procedure on grievances arising out of discharge, layoff or recall from layoff shall be as follows:...The written grievance of an employee on layoff arising out of recall from layoff should be delivered promptly by the Union to the Labor Relations office following the recall complained of, but in no event shall such employee be permitted to file such grievance beyond thirty (30) calendar days from the date he returns to work from such layoff.

Plaintiff filed his grievance within thirty days after his return to work as is required by the collective bargaining agreement.

13. All attempts on the part of the plaintiff to convince the Union to appeal the decision by Lockheed not to process the grievance were unsuccessful.

The Union officials with whom plaintiff and plaintiff's wife spoke indicate that there was nothing they could do to help in this situation. The Union did not request that the plaintiff's grievance be taken any further in the grievance procedure.

14. The Union has successfully processed and prosecuted grievances similar to plaintiff's with Lockheed in the past. The cases involving employees Dooley and Ervin, whom Lockheed had also terminated on the grounds that they had failed to respond in a timely fashion to a notice of recall from layoff, are similar in many respects to the case at bar.

Conclusions of Law

1. The collective bargaining agreement in force between Lockheed

and the Union at all relevant times in this case, as interpreted by these parties, allows an employee seven days in which to respond to a recall notice after the date of the receipt of the same when the employee has informed Lockheed of his correct address before the employee is deprived of his seniority.

2. Plaintiff informed Lockheed of his correct address in compliance with the terms of the collective bargaining agreement.

3. Plaintiff responded to the recall notice within seven days of receipt of the same as called for in the collective bargaining agreement, and therefore, should not have been deprived of his seniority.

4. Plaintiff attempted to file a meritorious grievance as soon as he learned that Lockheed, in violation

of the terms of the collective bargaining agreement, was attempting to deprive him of his seniority.

5. Further, in compliance with the collective bargaining agreement, plaintiff filed a meritorious grievance within thirty days after his return to work from Lockheed after layoff.

6. Although the Union had successfully processed similar grievances in the past, the Union refused to represent plaintiff in his grievance or process plaintiff's grievance and therefore, breached its duty to fairly represent plaintiff.

7. Further the Union failed to make any determination whatsoever on plaintiff's grievance, and thus, acted in an arbitrary and prefunctory manner in regard to plaintiff's grievance

in breach of its duty to represent plaintiff.

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, plaintiff is entitled to judgment against defendant Lockheed for restoration of plaintiff's seniority, and for all wages and benefits plaintiff would have received but for this wrongful denial of seniority. Further, judgment shall be awarded to plaintiff against defendant the Aeronautical Machinists Local Lodge 709, The International Association of Machinists and Aerospace Workers in the amount of $13,261.80, such amount constituting the reasonable attorney's fees incurred in bringing this action.

SO ORDERED, this 30th day

of September, 1981.

/s/ Charles A. Moye, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX A-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7810
Non-Argument Calendar

GEORGE C. ROGERS,

Plaintiff-Appellee,

versus

LOCKHEED-GEORGIA COMPANY AND THE AERONAUTICAL MACHINISTS LOCAL LODGE 708, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Defendants-Appellants.

Appeals from the United States
District Court
for the Northern District of Georgia

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

JUDGMENT

This cause came on to heard on the transcript of the record from the United States Distrcit Court for the Northern District of Georgia, and was taken under

submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEROF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of the Court.

Entered: Dec. 5, 1983

For the Court:
Spencer D. Mercer, Clerk

By: signed
Deputy Clerk

ISSUED AS MANDATE: March 9, 1984

RE-ISSUED AS MANDATE: April 5, 1984

APPENDIX A-4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7810

GEORGE C. ROGERS,

Plaintiff-Appellee,

versus

LOCKHEED-GEORGIA COMPANY, AND THE AERONAUTICAL MACHINIST LOCAL LODGE 708, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

---

ORDER

IT IS ORDERD that the objections of appellee to appellants' bills of costs are GRANTED. Each party shall bear its own costs.

/s/ JOHN C. GODBOLD
CHIEF JUDGE

APPENDIX A-5

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7810

GEORGE C. ROGERS,

Plaintiff-Appellee,

versus

LOCKHEED-GEORGIA COMPANY AND THE AERONAUTICAL MACHINISTS LOCAL LODGE 708, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 11 Cir., 198__, _____F.2d_____).

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge

in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ JOHN C. GODBOLD
United States Circuit Judge

FILED: March 1, 1984

Office - Supreme Court, U S
FILED
JUN 27 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. ROGERS,

Petitioner,

v.

LOCKHEED GEORGIA COMPANY, and AERONAUTICAL MACHINISTS LODGE 709, IAM&AW,

Respondents.

BRIEF OF AERONAUTICAL MACHINISTS LODGE 709 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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(*Counsel of Record*)

BEST AVAILABLE COPY

QUESTION PRESENTED

The only question presented by the Petition for Certiorari is whether this Court intended (but failed to state) that its decision in *Del Costello v. Teamsters* and *Steelworkers v. Flowers*, ____ U.S. ____, 103 S. Ct. 2281, 76 L.Ed.2d 476 (Nos. 81-2386 and 81-2408, June 8, 1983) should have only prospective application.

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-1958

GEORGE C. ROGERS,

Petitioner,

v.

LOCKHEED GEORGIA COMPANY, and AERONAUTICAL MACHINISTS LODGE 709, IAM&AW,

Respondents.

BRIEF OF AERONAUTICAL MACHINISTS LODGE 709 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

I.

STATEMENT OF THE CASE

A. Preface

In their appeals to the Eleventh Circuit, both Lockheed and Lodge 709 asserted that the District Court Opinion and Judgment were unauthorized by the facts and contrary to law. Since this fact is not reflected in the largely immaterial Statement in the Petition for Certiorari, we are compelled to make the following largely immaterial, but brief, statement of facts.

B. Statement Of Facts

The appellee, George C. Rogers, was first employed by Lockheed Georgia on July 12, 1965, and, except for two layoff periods, worked continuously at the company's Marietta plant until layoff in January, 1977. R. 422. He forfeited his seniority by failing to respond to a notice of recall from layoff mailed to him on June 20, 1978. He was rehired by Lockheed Georgia on March 9, 1979, was promoted to a supervisory position in October 1980, and is still employed by the Georgia Company. R. 423; TR 53, 58-59, 254-55. This hybrid breach of duty--301 action was filed in the District Court on March 21, 1980.

On May 1, 1981, the Union filed a Motion for Summary Judgment upon the basis that the action was time-barred. (R. 467). This motion was not ruled upon and was renewed at trial. The action was tried June 26-29, 1981, without a jury. On September 30, 1981, the trial court entered Findings of Fact and Conclusions of Law [1] and entered Judgment against the defendants. (R. 631-37). The Court did not address the timeliness issue.

The Union filed motion for reconsideration and again urged that the action had not been timely filed. (R. 640). The motion was denied (R. 669-70) and thereafter Lockheed Georgia and Lodge 709 appealed (R. 671).

Several weeks after his January, 1977, layoff Mr. Rogers learned of and applied for an opening in Tehran, Iran, with Lockheed Air Services ("LAS") which is a separate and independent division of the Lockheed Cor-

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[1] The trial court's conclusions of law were identical to proposed conclusions submitted by the plaintiff prior to trial and were challenged on appeal. See *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

poration. (Tr. 26-27). Rogers was employed by LAS in March 1977. By virtue of his previous layoffs Rogers admittedly was familiar with the change of address requirements imposed upon laid-off employees by Lockheed Georgia's contract with the Union. (R. 62-63).

The contract provides:

> An employee shall lose his seniority upon the happening of any one of the following events: . . .
>
> * * *
>
> (3) If, after a layoff, the employee is notified to report for an interview for work, by certified mail, or telegram, addressed to him at his address on record at time of layoff (or to the last subsequent address delivered by certified mail, telegram, or in person to the Employment Office of the plant), and fails within one (1) week after notification or such additional time as the Company may grant either to report for an interview or to deliver to the Company a reasonable excuse for failure to report.

Plf. Exhibits 17 and 18, Part B-Art. IV, Sec. 8; also R. 632-33.

The contract also provides:

> Failure on the part of an employee to keep the Company informed of his correct address and telephone number relieves the Company of the responsibility of any notification required by this agreement.

Plf. Exhibits 17 and 18, Part B-Art. VII, Sec. 8.

Despite his admitted awareness of the change of address requirements, Mr. Rogers prior to leaving for Iran failed to fill out the customary "change of address form" provided by Lockheed-Georgia or otherwise to assure that the Company had been notified officially of his change of address. (Tr. 62-65).

In June, 1978, Lockheed Georgia began to recall laid-off employees. On June 20, 1978, Lockheed sent a recall notice to Mr. Rogers offering him reemployment. This notice was sent to Rogers' Powder Springs, Georgia, address. That address was the only address which he had on file with the Company. (Tr. 220-222). Rogers, in Tehran, Iran, at that time, did not respond to this notice of recall within seven days. (Tr. 222-224). On June 29, 1978, Lockheed notified Rogers by letter at his Powder Springs address that because of his failure to respond, he had forfeited his seniority and recall rights under the collective bargaining agreement. (Tr. 222-224).

Prior to this attempt of Lockheed to recall Mr. Rogers, Vice President Moody of Lodge 709 learned that the Company planned to recall Mr. Rogers and that Mr. Rogers had failed to change his address at the Lockheed personnel office. (Tr. 260-61). Mr. Moody contacted two company personnel officials and requested that, in addition to sending Mr. Rogers' notice to his Georgia address, they also attempt to reach him in Iran. (Tr. 261-63). Since such additional notification was not required by the collective bargaining agreement, the Company declined to do so. (Tr. 262). Mr. Moody also spoke to a relative of Mr. Rogers and urged that he attempt to reach Mr. Rogers in Iran. (Tr. 260-61).

On July 3, 1978, Mr. Rogers returned to Georgia on a three-week vacation and learned of his recall notice and the subsequent loss of his seniority rights (Tr. 33-34). On the first day Lockheed's employment office was open after the July 4, 1978 holiday, Mr. Rogers went in person to the employment office to discuss the recall notice and his loss of seniority (Tr. 34-35). During his vacation in Georgia, Mr. Rogers also discussed his loss of seniority

with Union Vice-President Moody (R. 633). Mr. Moody advised Mr. Rogers that in sending the recall notice to the address on file with the Company, Lockheed had not breached the collective bargaining agreement. (Tr. 263, 41-42).

Although the Union had successfully handled grievances which he had filed in the past, Mr. Rogers did not file a grievance prior to his return to Iran following his vacation. (Tr. 67). In February, 1979, because of political turmoil in Iran, Mr. Rogers was evacuated from Iran to the United States and on March 9, 1979, accepted reemployment with Lockheed Georgia in an entry-level job. As a newly-hired employee, Mr. Rogers received a new seniority date. (Tr. 44-45). After Mr. Rogers reported to work for his reemployment, he discussed his loss of seniority with a Union steward who suggested that he file a grievance (Tr. 44-48). The Union steward filled out the grievance form, Mr. Rogers signed it on or about March 16, 1979, and the steward submitted it to the Company. (Tr. 67). The Company rejected Mr. Rogers' grievance on the basis that it was untimely. (Tr. 205-07).[2]

The Union agreed that Mr. Rogers' grievance was untimely and also determined that it lacked merit; therefore, the Union did not process it beyond the first step of the grievance procedure. (Tr. 280-81; 294-95).

The Union and the Company were in agreement that the collective bargaining agreement required the Com-

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[2] Part B, Article III, Sec. 1, of the Union contract provides that grievances arising from discharge shall be signed by the employee and filed within 10 days after discharge. Failure to respond to recall notice has been mutually interpreted to be synonymous with discharge. Rogers had actual notice of his termination and could have filed a timely grievance while at the plant in early July, 1978. (Tr. 36, 241-42, 250, 281).

pany to send notices of recall only to the address which an employee maintained on file with the Company and that it was the employee's responsibility to notify Lockheed of changes of address either in person or by certified mail or telegram. (Tr. 222-24, 263, 280-81, 286, 295).

The District Court found that the Union had processed grievances similar to that of Mr. Rogers on behalf of two other employees. Each of those employees, however, had filed properly filled out change of address forms and had failed to receive their recall notices through no fault of their own. (Tr. 282-88).

Shortly after the Union withdrew his grievance, Rogers filed an unfair labor practice charge with the National Labor Relations Board in which he charged the Union with a breach of its duty of fair representation in failing to process his grievance further (Tr. 69). On June 4, 1979, the Board's General Counsel refused to issue a complaint against the Union because the Regional Director determined that Mr. Rogers' grievance had not been timely filed. (Tr. 69-70). This action was filed a year later, on March 21, 1980.

II.

REASONS WHY THE WRIT SHOULD BE DENIED

A. No Substantial Conflict In Circuit Decisions

As of this writing, since the *Del Costello* decision [3] in June, 1983, nine circuit courts have decided whether the decision applied to pending cases and thus had "retroactive" application. Eight circuits [4] have decided affirma-

[3] *Del Costello v. Teamsters Union*, ____ U.S. ____, 103 S. Ct. 2281, 76 L.Ed.2d 476 (June 8, 1983).

[4] Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits.

tively and one [Ninth] has decided negatively. In addition two circuits [First and D.C.] have acknowledged the decision and distinguished it from cases *sub judice*. Only the Tenth Circuit has no reported decision which cites or discusses *Del Costello*. The circuit court decisions are listed and categorized in the Appendix of Decisions, *infra*.

Consequently, there is no substantial conflict between the circuits upon the question presented in this case.[5]

B. *Del Costello* Rule Was Made Retroactive From Its Inception In Order To Advance Its Purposes

As was noted by the Third, Fifth and Eleventh Circuits in their decisions specifically holding that the *Del Costello* rule should be applied to pending cases,[6] it is a "general rule of long standing . . . that judicial precedents normally have retroactive as well as prospective effect."[7] *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1130 (D.C. Cir., 1976). That "general rule" is a rule of necessity because when the law is found and declared by the Court in the case under review, the rule of law which is found and declared is applied in that case; otherwise, the rule of law would be *obita dicta*. See historical discussions in *Linkletter v. Walker*, 381 U.S. 618, 621-29, 85 S.Ct.

[5] Petitioner's assertion that Third and Sixth Circuit decisions create conflict is incorrect. *Pitts v. Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir., 1983) was decided several months before the *Del Costello* decision was issued; and *Scott v. Teamsters Union Local 863*, 725 F.2d 226 (3rd Cir., 1984) gives retroactive application to the *Del Costello* rule.

[6] *Perez v. Dana Corporation*, 718 F.2d 581, 584 (3rd Cir., 1983); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857, 859 (5th Cir., 1983), conforming to ___ U.S. ___, 77 L.Ed.2d 1360, June 1983; *Rogers v. Lockheed Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir., 1983).

[7] "Retroactive" connotes application to cases pending in which judgments remain subject to review but not to the reopening of closed proceedings. *Linkletter v. Walker*, 381 U.S. 618, 621-29, 85 S. Ct. 1731, 14 L.Ed.2d 601 (1965).

1731, 14 L.Ed.2d 601 (1965), and in 1B Moore, Federal Practice, ¶ 0.402 [3-2-1, et seq], pages 56-95.

Consequently, on occasion, when this Court has intended that its decisions would have only prospective or partially prospective application, it has included such a provision in the decision itself.[8]

However, the decision in *Del Costello* was not restricted in its application by this Court but was applied retroactively in both the *Flowers* and *Del Costello* cases, and the issue of retroactivity had been raised in the latter case. See 76 L.Ed.2d, at 496, n. 2. Furthermore, the intention of this Court that the *Del Costello* rule should apply to pending cases is shown by its own retroactive application of the rule in other cases.[9] See *Linkletter, supra*, 381 U.S., at 622 and n. 4.

It seems to us, therefore, that the Third, Fifth, Ninth and Eleventh Circuits were somewhat presumptuous in their *Perez, Edwards* [Fifth and Ninth], and *Rogers* decisions [10] in undertaking to apply the *Chevron v. Huson* analysis [11] to the *Del Costello* rule when this Court had already demonstrated its intention that the rule would

---

[8] See, e.g., *Arizona Governing Committee v. Norris*, ____ U.S. ____, 77 L.Ed.2d 1236, 51 U.S.L.W. 5243 (July 6, 1983); *James v. United States*, 366 U.S. 213, 81 S. Ct. 1052, 6 L.Ed.2d 246 (1961). Also, *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360, 366 (1932).

[9] Certiorari was granted and judgments were reversed, citing *Del Costello*, in *Teamsters Union v. Edwards*, ____ U.S. ____, 77 L.Ed.2d 1360, #82-1054, June 20, 1983; and *Hospital and Health Care Employees v. Assad*, ____. U.S. ____, 78 L.Ed.2d 73, #82-1975, October 3, 1983.

[10] Appendix of Decisions, *infra*.

[11] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-7, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971).

have "retroactive" application.[12]

Nevertheless, the Third, Fifth and Eleventh Circuits in undertaking that analysis gave proper weight to the second factor—the purpose of the rule in fostering the prompt dispatch of labor disputes and uniformity in the Federal regulatory scheme—which was so strongly emphasized by this Court in the *Del Costello* decision and properly held that the rule was applicable to pending cases in order to advance the purpose of the rule.

C. *Del Costello* Rule Was Not A Break From Established Precedent And Is No More Inequitable Than Any Other Rule Of Repose

The Third, Fifth and Eleventh Circuits correctly find in their *Perez* [718 F.2d, at 586], *Edwards* [720 F.2d, at 861 and 862], and *Rogers* [720 F.2d, at 1250] decisions that prior to *Del Costello* "a legally chaotic situation" was the rule, that there was no "clear past precedent" and that the purpose of *Del Costello* was to remedy the "inconsistent results" which were prevailing. Hence the six months rule was no break from well esrablished precedent.[13]

All statutes of limitation will be called inequitable by some, but praised by others. In *Del Costello* and in others of the cases listed in the Appendix of Decisions, *infra*, plaintiffs benefited by the reinstatement of cases which previously had been dismissed by the application of shorter periods of limitation than the new uniform six months rule.

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[12] Like the present case, none of these cases presented special facts showing reliance upon representations of the defendants with resulting delay in the instigation of the litigation, such as could create an equitable estoppel.

[13] Cf. *United Parcel Service v. Mitchell*, 451 U.S. 56, 101 S. Ct. 1559, 67 L.Ed.2d 732 (1981). Georgia has no statute of limitations *generally* applicable to arbitration awards.

Rules of repose, standing alone, do not present unconscionable situations of reliance on existing law or create estoppel by promise or contract. In other words, "equity" aids those who are vigilant and diligent and such rules are not "inequitable".

Therefore, application of the three factors delineated in *Chevron v. Huson* results, on all counts, in the conclusion that the *Del Costello* rule is applicable "retroactively" to pending cases.

CONCLUSION

For the reasons stated the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX OF DECISIONS

Del Costello Rule Retroactive

Second Circuit:

Assad v. Mt. Sinai Hospital, 725 F.2d 837 (2nd Cir., 1984), conforming to ___ U.S. ___, ___ S. Ct. ___, 78 L.Ed.2d 73, #82-1975, October 3, 1983);

Steelworkers Union v. Flowers, ___ U.S. ___, 103 S. Ct. 2281, 76 L.Ed.2d 476 (1983), reversing 671 F.2d 87 (2nd Cir., 1982).

Third Circuit:

Perez v. Dana Corporation, 718 F.2d 581 (3rd Cir., 1983);

Scott v. Teamsters Union Local 863, 725 F.2d 226 (3rd Cir., 1984).

Fourth Circuit:

Del Costello v. Teamsters Union, ___ U.S. ___, 103 S. Ct., 2281, 76 L.Ed.2d 476 (1983), reversing and remanding 679 F.2d 879 (4th Cir., 1982);

Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir., 1983).

Fifth Circuit:

Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir., 1983, conforming to ___ U.S. ___, ___ S. Ct. ___, 77 L.Ed.2d 1360, #82-1054, June 20, 1983);

Farr v. H. K. Porter Co., 727 F.2d 502 (5th Cir., 1984).

Sixth Circuit:

Curtis v. Teamsters Union Local 299, 716 F.2d 360 (6th Cir., 1983).

Seventh Circuit:

Storck v. Teamsters Union Local 600, 712 F.2d 1194 (7th Cir., 1983);

Metz v. Tootsie Roll Industries, 715 F.2d 299 (7th Cir., 1983), cert. den. 52 LW 3534, #83-819, Jan. 16, 1984;

Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir., 1983), cert. den. 52 LW 3509, #83-687, January 9, 1984.

Eighth Circuit:

Lincoln v. Machinists Union District Lodge 9, 723 F.2d 627 (8th Cir., 1983);

Vadasz v. Greyhound Lines, 723 F.2d 620 (8th Cir., 1983);

Stahlman v. Kroger Co., 723 F.2d 621 (8th Cir., 1983);

Arrow v. Pulitizer Publ. Co. (St. Louis Post-Dispatch), 723 F.2d 622 (8th Cir., 1983);

Askew v. F&W Express, Inc., 723 F.2d 624 (8th Cir., 1983);

Wilcoxen v. Kroger Co., 723 F.2d 626 (8th Cir., 1983);

Aarsvold v. Greyhound Lines, 724 F.2d 72 (8th Cir., 1984);

Andres v. Teamsters Union, 724 F.2d 73 (8th Cir., 1983);

Gustafson v. Cornelius Co., 724 F.2d 75 (8th Cir., 1983).

Eleventh Circuit:

Hand v. Chemical Workers Union, 712 F.2d 1350 (11th Cir., 1983);

Benson v. General Motors Corp., 716 F.2d 862 (11th Cir., 1983);

Rogers v. Lockheed Georgia Co., 720 F.2d 1247 (11th Cir., 1983);

Erkins v. Steelworkers Union, 723 F.2d 837 (11th Cir., 1984), cert. denied 52 LW 3888, #83-1866, June 11, 1984.

Del Costello Rule Prospective

Ninth Circuit:

Edwards v. Teamsters Union Local 36, 719 F.2d 1036 (9th Cir., 1983), cert. den. 52 LW 3687, #83-1211, March 19, 1984;

McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir., 1984), pet. for cert. filed, April 26, 1984, #83-1739;

Barina v. Gulf Trading & Transport Co., 726 F.2d 506 (9th Cir., 1984).

Del Costello Rule Acknowledged

District of Columbia Circuit:

Majewski v. B'nai B'rith International, 721 F.2d 823, 824, n. 3 (D.C. Cir., 1983).

First Circuit:

Derwin v. General Dynamics Corp., 719 F.2d 484, 487, 489 (1st Cir., 1983).

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No. 83-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. ROGERS,

Petitioner,

v.

LOCKHEED-GEORGIA COMPANY and
AERONAUTICAL MACHINISTS LODGE 709
THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT LOCKHEED-GEORGIA COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent Lockheed-Georgia Company ("Lockheed" hereinafter) disagrees with petitioner's statement of the issues presented for review. The following are the issues which Lockheed believes are presented for review:

1) Did the Court of Appeals fail to give any weight to the results of retroactive application of the statute of limitations on Petitioner?

2) Did the Court of Appeals give the proper weight to the inequity of applying different statutes of limitations to similar claims?

3) Should the Court of Appeals have applied a statute of limitations prospectively-only where the Court of Appeals found that it would defeat the purpose of this Court's ruling in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983) to have done so and where the petition for a writ of certiorari does not challenge the ruling that the purpose of this Court's ruling would be so defeated?

4) Did *DelCostello v. International Brotherhood of Teamsters, supra*, create a new principle of law which would justify prospective-only application of the statute of limitations?

5) Should the Court's ruling in *DelCostello v. International Brotherhood of Teamsters, supra*, be applied retroactively?

LIST OF CORPORATIONS RELATED TO RESPONDENT LOCKHEED-GEORGIA COMPANY IN COMPLIANCE WITH RULE 28.1

Lockheed Corporation
Cadam Inc.
CSL Leasing Corporation
Dialog Information Services, Inc.
Guam Air Terminal Corporation
LDS Corporation
Lockheed Air Terminal, Inc.
Lockheed Air Terminal of New York, Inc.
Lockheed Air Terminal, S.A.
Lockheed Aircraft (Asia) Limited
Lockheed Aircraft (Australia) Pty. Limited
Lockheed Aircraft Deutschland GmbH
Lockheed Aircraft International, A.G.
Lockheed Aircraft International, Inc. (LAI)
Lockheed Aircraft International Limited (LAIL)
Lockheed Aircraft Service-International
Lockheed Aircraft Service Singapore Private Limited
Lockheed Canada Inc.
Lockheed Corporation (Int'l) S.A.
Lockheed Dataplan, Inc.
Lockheed Domestic International Sales Corporation II
Lockheed Electronics Company, Inc.
Lockheed Engineering and Management Services Company, Inc.
Lockheed Finance Corporation
FCL Credit Corporation
Lockheed Georgia International Services, Inc.
Lockheed International Limited Taiwan
Lockheed International Service and Investment Corporation
Lockheed Missiles & Space Company, Inc.
Lockheed Mortgage Corporation
Lockheed Overseas Capital N.V.
Lockheed Shipbuilding Company

Lockheed Space Operations Company
Lockheed Support Systems, Inc.
Lockheed Systems Company, Inc.
Lockheed Technical Enterprises Corporation
Lockheed Technical Services Company, Inc.
Lockheed Technology S.A.
Lockheed Western Export Company
Memrykord Limited
Murdock Engineering Company
Oklahoma Fueling Facilities Corporation
Star Reconveyance Corporation
Tricities Protective Services, Inc.
Tristar Parts, Ltd.
Colby Crane & Manufacturing, Inc.
Getex Inc.
Lockheed Electronics International Operations, Inc.
Lockheed Systems & Services Company, Inc.
Los Angeles Fueling Facilities Corporation
San Francisco Fueling Facilities Corporation
Utah Fueling Facilities Corporation
Puget Sound Bridge & Dry Dock Company, Inc.
Vega Aircraft Company
Arizona Fueling Facilities Corporation
CTL Corporation
Gulf Technology Systems Group (not fully formed)
Honolulu Fueling Facilities Corporation
(LAT selling stock)
Letlock Saudi Arabia Co. Ltd.
Lockheed-Arabia
Lockheed-Sait Electronics S.A. (dissol. pending)
Lockheed Technical Services (Malaysia) S.B.
Ocean Minerals, Inc.
Pacific Aerospace Corporation Limited
Panel Lock Homes (Phil.) Inc.
Portland Fueling Facilities Corporation
Reno Fueling Facilities Corporation
Transnational Housing Company

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IN THE

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OCTOBER TERM, 1983

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GEORGE C. ROGERS,

Petitioner,

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LOCKHEED-GEORGIA COMPANY and
AERONAUTICAL MACHINISTS LODGE 709
THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT LOCKHEED-GEORGIA COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Lockheed adopts the statement of the case of Respondent Aeronautical Machinists Lodge 709 in its Brief In Opposition To Petition For Writ of Certiorari.

Lockheed disagrees with one section, in particular, of Petitioner's statement of the case. Page 12 of the peti-

tion seems to state that the Fifth Circuit held in *Sanderson v. Ford Motor Company*, 483 F.2d 102, 114 (5th Cir. 1973) that statutes of limitations for personal injury actions were to be applied to breach of collective bargaining agreement—breach of the duty of fair representation actions such as this one. However, the Fifth Circuit in the *Sanderson* case did not so hold. The case merely indicated that the Alabama statute of limitations for personal injury was the most appropriate to apply to an Alabama case. Neither *Sanderson* nor any other Fifth Circuit case ever held that statutes of limitations for personal injury were the appropriate ones to apply to all states or that the Georgia statute of limitations for personal injury was the appropriate statute to apply to cases of this type arising in Georgia.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit considered all of the factors mandated by this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Although Petitioner criticizes the court below for not giving sufficient consideration to the individual facts of Petitioner's case in weighing the equities, the balancing of the equities was proper here. The Court of Appeals found the decisive factor to be that the application of different statutes of limitations to similar claims based upon geographic location was inequitable. This was entirely in keeping with the requirement of the *Chevron* decision that the equities be considered. Further, there is nothing in the individual facts of petitioner's case which singles it out for prospective-only application of the statute of limitations.

The Petition should also be denied because, even assuming that the third part of the *Chevron Oil Co. v. Huson* test was misapplied by the Court of Appeals, Petitioner failed to meet the first two parts of that test, and all three parts must be met before the courts will take the unusual step of applying a decision prospectively-only.

The result reached by the Court of Appeals here is the same result which this Court reached in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983) and which has been reached by numerous other courts of appeals (with only one court of appeals taking a different approach). The decision herein, therefore, is not worthy of review on a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit Considered All Of The Factors Mandated By The Decision In *Chevron Oil Company v. Huson* In Applying The Statute Of Limitations Retroactively In This Case

This court determined in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) that a three-part test should be applied to determine whether or not the general rule that decisions are to have a retroactive effect is to be applied in a particular case. Under the *Chevron* decision, the three prongs of the test are: (1) "the decision to be applied nonretroactively must establish a new principle of law"; (2) whether the purpose of the rule will be furthered or retarded by retroactive application; and (3) "the inequity imposed by retroactive application . . . ." *Chevron Oil Co. v. Huson*, 404 U.S. at 106-107. The Petition here is based upon the argument that the Court of Appeals incorrectly applied the third prong of the *Chevron* test. (Petition, pp. 15-31).

It is undisputed that the Court of Appeals applied all three parts of the *Chevron* test. With regard to the third part, the balancing of the equities, the Court of Appeals found that "prospective application of *DelCostello* would cause inequitable results." (A-1, p. 10). The only criticism in the Petition of the Eleventh Circuit's consideration of the equities is the claim that the Court did not "consider the interests of the individual parties involved." (Petition, p. 25). However, the opinion does not state or otherwise indicate that the facts of Mr.

Rogers' particular case were not considered by the Court. Portions of the opinion discuss the pertinent facts of Mr. Rogers' case. (A-1, p. 2). All that the opinion can be considered to demonstrate is that factors of a broad-ranging nature prevailed in the balancing of the equities. The Court held that it would be inequitable to apply different statutes of limitations to essentially similar claims based purely on the geographic location in which the federal cause of action arose. (A-1, pp. 10-11). This, Lockheed submits, is sound analysis. The analysis is contrary to nothing in *Chevron* or in any other decision, and it certainly raises no issues worthy of consideration by this Court on a writ of certiorari.

Further, although the Petition is based almost solely upon the absence of an articulation of consideration of the specific facts of Petitioner's individual case, those facts do not mandate a different result. The only specific fact which Petitioner points to in his case which he says should have produced a different ruling was the fact that his lawsuit was initiated some time before the *DelCostello* decision was announced. This does not significantly differentiate his case from any other case in which application of the *Chevron* standard would be appropriate. Unless a rule was announced after a case arose, there would be no point in even considering prospective-only application of the rule. Although Petitioner places some emphasis on the length of time between when his alleged cause of action arose and when the *DelCostello* decision was announced, this period of time was no greater than the similar period involving plaintiff Flowers in the *DelCostello* decision[1] (Petition, p. 21), to whom the same statute of limitations was retroactively applied. *See* 103 S. Ct. at 2286, 2294. Thus, Petitioner has cited no facts which indicate that his case

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[1] The Flowers case, *United Steelworkers v. Donald C. Flowers*, 103 S. Ct. 2281 (1983) was consolidated with the *DelCostello* case and decided in the same opinion.

was extraordinary or that it deserved to be treated differently from other cases where the retroactive application of the *DelCostello* decision was involved. Even if it is assumed that the Eleventh Circuit should have given more consideration to the individual facts of Petitioner's case, the result would have been the same.

II. The Petition Should Not Be Granted Because Even If The Court Of Appeals Improperly Applied The Third Prong Of The *Chevron Oil Company v. Huson* Test, Petitioner Failed To Meet The First Two Prongs Of That Test

When a party is seeking to avoid retroactive application of a decision, "[a]ll three of the factors listed in *Chevron Oil* must be shown to favor prospective-only application before a decision will be denied retroactive effect." *Cochran v. Birkel*, 651 F.2d 1219, 1223 N. 8 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982), *quoting Valencia v. Anderson Brothers Ford*, 617 F.2d 1278, 1288-1289 (7th Cir. 1980), *rev'd. on other grounds*, 452 U.S. 205 (1981). Accordingly, assuming that Petitioner satisfied the third part of the *Chevron* test, he still would not be able to prevail unless he established that a new principle of law had been applied to him and that the purpose of the new rule would not be retarded by prospective-only application.

The Court of Appeals found that failure to apply *DelCostello* retroactively "would retard rather than further the federal interest in prompt resolution of labor disputes." (A-1, p. 10). The Petition for Certiorari does not give any reason why this decision by the Court of Appeals was incorrect and it clearly was proper. Thus, Petitioner failed to satisfy the second part of the *Chevron* test.

Further, Petitioner failed to satisfy the first part of the *Chevron* test. Although the Court of Appeals assumed, without deciding, that *DelCostello* announced a

new principle of law, Petitioner did not carry his burden in this regard. The state of the law concerning the statute of limitations at the time that the alleged cause of action in this case arose was a "legally chaotic situation" in which there was no clear rule. *Lawson v. Truck Drivers*, 698 F.2d 250, 254 (6th Cir.), *cert. denied*, 104 S. Ct. 69 (1983); *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983). Although the Petitioner claimed to have relied on the statute of limitations found in Ga. Code Ann. § 3-1004 (1975) (*see* Appellee's Response To The Opinions Rendered in *DelCostello* and *Hand* As They Apply To The Instant Action, p. 5—filed in the court below) he was unable to cite any decision of any court which held that the statute was the appropriate statute of limitations for cases of this type arising in Georgia.

Thus, Petitioner failed to satisfy both the first and second parts of the *Chevron* test. Since he was required to satisfy both parts before he could establish that the retroactive application of the statute of limitations was improper, Petitioner would not be entitled to prevail even if he demonstrated that the Court of Appeals erred in balancing the equities.

III. The Eleventh Circuit Was Correct In Applying The Six Month Statute Of Limitations Retroactively To This Case

In *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983), this Court applied the six-month statute of limitations retroactively to the parties before it under facts which were similar in all relevant respects to the facts in this case. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have all either applied the six-month statute of limitations retroactively or indicated that they would do so. *See Assad v. Mount Sinai Hospital*, 725 F.2d 837, 838 (2d Cir. 1984); *Perez v. Dana Corp.*, 718 F.2d 581, 588 (3d Cir. 1983); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146, 1148 (4th Cir. 1983); *Edwards v. Sea-*

Land Service, Inc., 720 F.2d 857, 862-63 (5th Cir. 1983); *Curtis v. International Brotherhood of Teamsters, Local 299*, 716 F.2d 360, 361 (6th Cir. 1983); *Storck v. International Brotherhood of Teamsters, Local Union No. 600*, 712 F.2d 1194, 1196 (7th Cir. 1983); *Lincoln v. District 9 of the International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); and *Hand v. International Chemical Workers Union*, 712 F.2d 1350, 1351 (11th Cir. 1983). In addition to the Eleventh Circuit, the Third and Fifth Circuits have specifically considered the question of retroactivity and have held that the statute of limitations is to be applied retroactively. *See Perez v. Dana Corp.*, 718 F.2d at 588; *Edwards v. Sea-Land Service, Inc.*, 720 F.2d at 862-863. Only the Ninth Circuit has held to the contrary. *See Edwards v. Teamsters Union, Local 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984).

Even if the *DelCostello* decision itself is not considered to have completely disposed of this matter, the weight of authority clearly supports retroactive application of the statute of limitations and review of the Eleventh Circuit's action in this case is therefore inappropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

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